city may be estopped from asserting irregularities in the exercise of a power as distinguished from entire absence of power. *Marcy* v. *Oswege*, 92 U. S. 637. And it is sometimes held that there is an estoppel against a municipal corporation when it has permitted long adverse user of public property and large expenditures thereon. *Paine Co.* v. *Oshkosh*, 89 Wis. 449. But see *London Bank* v. *Oakland*, 90 Fed. 691, 701. Even in the case of utter lack of capacity the only objection to estopping the city would seem to be the necessity of saving municipalities from the danger of the misconduct of corrupt officials. But see *Schumm* v. *Seymour*, 24 N. J. Eq. 143, 154. This objection failing where it is sought to hold the outsider, it would seem that the estoppel should exist in the circumstances of the principal case. See *New York* v. *Sonneborn*, 113 N. Y. 423, 426, 21 N. E. 121; *Buffalo* v. *Balcom*, 134 N. Y. 532, 536, 32 N. E. 7, 8.

NEGLIGENCE — DUTY OF CARE — BUSINESS CUSTOM AS A TEST OF DUE CARE. — The plaintiff, an employee of the defendant, was injured while working on one of the defendant's cars. The defendant requested a charge that it need exercise only the usual care of those engaged in the same business. *Held*, that the refusal so to charge was error. *Canadian Northern Ry. Co.* v. *Senske*, 201 Fed. 637 (C. C. A., Eighth Circ.).

In this doctrine the court has followed the language used in several other decisions in the federal courts. See *Shankweiler* v. *Baltimore & Ohio R. Co.*, 148 Fed. 195, 197; *Grand Trunk Ry. Co.* v. *Ives*, 144 U. S. 408, 416, 12 Sup. Ct. 679, 682. But the decisions scarcely bear out the conclusion that this is the sole test for the jury. But see *Chicago Great Western Ry. Co.* v. *Minneapolis, etc. Ry. Co.*, 176 Fed. 237, 242. The care others exercise should at most be only evidence of the care that a reasonably prudent man would exercise under the circumstances. See 14 HARV. L. REV. 156.

NUISANCE — RECOVERY OF DAMAGES — RECOVERY OF DAMAGES BY ONE HAVING NO RIGHT IN THE PROPERTY AFFECTED. — The defendant constructed and maintained a pond which emitted noxious air, causing the death of the plaintiff's intestate, while the latter was rightfully living in the house of his father. *Held*, that the defendant is liable for causing the death of the plaintiff's intestate by maintaining a nuisance. *Hosmer* v. *Republic Iron & Steel Co.*, 60 So. 801 (Ala.).

The early law imposed absolute liability for injury caused, without regard to the fault of the actor. As to damage done to realty this conception has, to a large extent, persisted. See article by Professor BOHLEN, 59 U. OF PA. L. REV. 298, 309, 310. Private nuisance partook of this nature, since it consisted of an injury to land or to the enjoyment or dominion of the possessor. See 3 BL. COMM., 216; COOLEY, TORTS, 3 ed., 1174. Consequently the fault of the person responsible for the nuisance was regarded as immaterial. See 59 U. OF PA. L. REV. 313, 314. It has long been recognized, however, that there is no liability for injuries purely personal, except in so far as there is fault on the part of the actor. See HOLMES, COMMON LAW, 88–90. In allowing an action on the case for nuisance by one who has no legal estate or possessory interest in land the court is historically wrong. Moreover, it is running counter to modern ideas of justice which discountenance tort liability without culpability unless there are special demands of social expediency. Here, on the contrary, there is the practical objection, which has had weight in the law, that the defendant is thereby subjected to a multiplicity of actions. See *Proprietors of Quincy Canal* v. *Newcomb*, 7 Met. (Mass.) 276, 283. The weight of authority is against the principal case. *McCalla* v. *Louisville & Nashville R. Co.*, 163 Ala. 107, 50 So. 971; *Ellis* v. *Kansas City, St. J. & C. B. R. Co.*, 63 Mo. 131; *Hughes* v. *Auburn*, 161 N. Y. 96, 55 N. E. 389; *Holly* v. *Boston Gas Light Co.*, 8 Gray (Mass.) 123. (Specifically placed on the ground that there was no negligence.) *Cf.*

Kavanagh v. *Barber*, 131 N. Y. 211, 30 N. E. 235. *Contra, Fort Worth & Rio Grande Ry. Co.* v. *Glenn*, 97 Tex. 586, 80 S. W. 992. See *Towaliga Falls Power Co.* v. *Sims*, 6 Ga. App. 749, 752, 753, 65 S. E. 844, 846. If the plaintiff's injury were occasioned by an act of the defendant and the defendant could have foreseen the injurious quality of the act, there should be a recovery on the ordinary principles of negligence. *Hunt* v. *Lowell Gas Light Co.*, 8 Allen (Mass.) 169. The plaintiff's protection would be complete if there is imposed on the defendant an affirmative duty to take reasonable measures to maintain his premises in a condition which would not cause injury to outsiders.

PUBLIC-SERVICE COMPANIES — REGULATION OF PUBLIC-SERVICE COMPANIES — CONTRACT FOR DIVISION OF TERRITORY: WHETHER AN ILLEGAL RESTRAINT OF COMPETITION. — A state public-utilities law empowered a commission to prevent exorbitant charges. A statute prohibited agreements to restrain competition in the supply of any commodity of general use. The plaintiff and the defendant, two competing telephone companies, entered into a contract to divide the territory. *Held*, that the contract is specifically enforceable. *McKinley Tel. Co.* v. *Cumberland Tel. Co.*, 140 N. W. 38 (Wis.).

Apart from statutes such contracts between public-service companies are generally held void, as being in restraint of trade. *South Chicago City Ry. Co.* v. *Calumet Electric St. Ry. Co.*, 171 Ill. 391, 49 N. E. 576; *Chicago Gas Light & Coke Co.* v. *People's Gas Light & Coke Co.*, 121 Ill. 530, 13 N. E. 169. But *cf. Ives* v. *Smith*, 3 N. Y. Supp. 645, 654. Pooling agreements are equally objectionable. *Chicago, M. & St. P. Ry. Co.* v. *Wabash, St. L. & P. Ry. Co.*, 61 Fed. 993; *Texas & P. Ry. Co.* v. *Southern Pacific Ry. Co.*, 41 La. Ann. 970, 6 So. 888. But *cf. Manchester & L. R. Co.* v. *Concord R. Co.*, 66 N. H. 100, 20 Atl. 383. It is undoubtedly the theory of the common law that competition is essential to trade. See *Hooker* v. *Vandewater*, 4 Den. (N. Y.) 349, 353. But see *Kellogg* v. *Larkin*, 3 Chand. (Wis.) 133, 159. In private business this theory is still unquestioned by the courts, but experience has not vindicated the wisdom of its full application to public callings. The field in any given case must necessarily be very limited, and fierce competition between a few great public-service corporations may often result disastrously for the public. See *Averill* v. *Southern Ry. Co.*, 75 Fed. 736, 738; *Hare* v. *London & N. W. Ry. Co.*, 2 Johns. & H. 80, 103. At least in the case of telephone companies, a regulated monopoly furnishes better service. When a legal restraint was placed on all monopolies by the common law, the uncertain condition of public-service law caused the courts to overlook the fact that in the case of public-service companies, the absolute prohibition of unreasonable rates could have furnished a sure means of preventing the dangers of monopoly. See 2 MORAWETZ, PRIVATE CORPORATIONS, 2 ed., § 1131. When modern legislation has made this means of regulation effective by providing for public-utilities commissions, it seems reasonable for the courts to make an exception to the common-law rule in the case of public-service companies. *Weld* v. *Gas & Electric Light Commissioners*, 197 Mass. 556, 84 N. E. 101.

PUBLIC-SERVICE COMPANIES — WHAT CALLINGS ARE PUBLIC — CEMETERIES. — The respondent corporation maintained a cemetery, for several years serving the general public, both whites and negroes, without discrimination. Thereafter a rule was made that no further lots should be sold to negroes. A negro petitioned for a writ of mandamus to compel the cemetery company to accept the body of his negro wife for burial. *Held*, that the petition was properly dismissed. *People ex rel. Gaskill* v. *Forest Home Cemetery Co.*, 101 N. E. 219 (Ill.).

The principal case raises the question whether the cemetery is a public-service company under duty to serve all the public without discrimination.